Supreme Court, U.S.
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No. 02-1769

IN THE

Supreme Court of the United States

MICHAEL JONES,

Petitioner,

v.

PORT TERMINAL RAILROAD ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

An accurate statement of the questions presented in this case are:

1. Whether the "in use" doctrine of the Safety Appliance Act, 49 U.S.C. § 20302, applies to switchmen, the craft to which Michael Jones belonged, or whether switchman are exempt from that doctrine.

2. Whether the railroad tank car was "in use" at the time of Michael Jones' injury (stated by Petitioner).

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner correctly identifies the parties to the proceedings.

The Port Terminal Railroad Association is an association of railroads, which pertinent to this suit consisted of the Burlington Northern Santa Fe Railway Company, Union Pacific Railroad Company and Texas-Mexican Railway Company. The Port Terminal Railroad Association is not a corporation and does not issue stock.

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COUNTER-STATEMENT OF THE CASE

Petitioner Michael Jones brought this suit against Respondent Port Terminal Railroad Association, his employer, under the Federal Employer's Liability Act, 45 U.S.C. § 51 (1986), and the Safety Appliance Act, 49 U.S.C. §§ 20301-20306 (1997) (formerly 45 U.S.C. §§ 1-16), for personal injuries received on October 16, 1997, while working as a switchman on a Port Terminal Railroad Association crew. Petitioner claimed to have been injured while inspecting a group of railroad cars at an industry serviced by the Port Terminal Railroad Association. The cars were stationary, awaiting movement by Petitioner's crew. Petitioner was performing a required inspection of the cars before their movement from the industry storage track. Petitioner, the first Port Terminal Railroad Association employee to inspect or otherwise handle the cars after their use by the industry, was allegedly injured when a handhold became loose while he was dismounting one of the cars.

Before trial, Respondent moved for partial summary judgment on the Safety Appliance Act issue, asserting that the car was not "in use" at the time of Jones' injury. The trial court denied the motion. CR p. 64. The case was tried to a jury verdict, with the jury finding neither party negligent. CR p. 65, 69. The jury did find a Safety Appliance Act violation in an insecure handrail. CR p. 65, 68. No jury question was submitted on whether the car was "in use," since that issue is a matter of law for a court to determine.

Following the verdict, Respondent filed a Motion for Judgment Non Obstante Veredicto. The trial court denied the motion and entered a judgment on October 26, 2000, awarding Petitioner judgment on the Safety Appliance Act violation. CR p. 75.

Respondent appealed to the Texas Court of Appeals sitting in San Antonio, Texas. On May 8, 2002, the Texas Court of Appeals delivered its opinion reversing the trial court, holding that the car was not "in use" at the time of the injury and denying any recovery to Petitioner.

Petitioner filed with the Texas Supreme Court a Petition for Review of the Texas Court of Appeals decision, which was denied on November 21, 2002.

REASONS FOR DENYING THE PETITION

Overview

The Petition for Writ of Certiorari fails to present issues, much less compelling reasons, for review by the United States Supreme Court. One of the issues stated by Petitioner addresses a factual determination by the Texas Court of Appeals. The purported legal issue phrased by Petitioner involves no conflict with any decision of the United States Supreme Court, any United States Court of Appeals or any state court of last resort. The only conflict Petitioner actually identifies involves an unreported decision of a different Texas Court of Appeals that has no precedential value. The decision of the Texas Court of Appeals below does not decide a question that has not been settled by this Court. Moreover, the decision below is correct.

The Ruling of the Texas Court of Appeals does not Create Conflict Worthy of Review.

Petitioner cannot identify a conflict presented by his petition to justify review by this Court. The Texas Court of Appeals made a straight forward application of the "in use"

doctrine of the Safety Appliance Act, a doctrine recognized by this Court at least as early as 1938 in *Brady v. Terminal R.R. Assn.*, 303 U.S. 10 (1938), and determined that under the undisputed material facts of the case, the car in question was not "in use" at the time of the accident. Because the car was not "in use," Jones did not have a Safety Appliance Act cause of action.

Accordingly, this case does not present a conflict of a decision by a United States Court of Appeals with that of any other court. Petitioner cannot identify a conflict between the Texas Court of Civil Appeals decision, even with its denial of review by the Texas Supreme Court, with the decision of any other state court of last resort or with a United States Court of Appeals. Indeed, the opinion of the Texas Court of Appeals specifically followed those cases recently decided by United States Courts of Appeals on point. Nor can Petitioner identify a conflict between the Texas Court of Appeals decision and any relevant decision by this Court. To the extent the United States Supreme Court has addressed the issue, those holdings are consistent with the opinion below and no conflict exists.

The only legal issue squarely presented in this case is whether a particular craft, that of railroad switchmen, is somehow exempt or given preferential treatment under the "in use" doctrine of the Safety Appliance Act. In *Brady v. Terminal R.R. Assn.*, a Safety Appliance Act handhold case, this case identified as the first issue before it "whether the car can be said to have been "in use" by the [railroad] at the time in question." 310 U.S. at 13. Prior to *Brady*, the "in use" doctrine had been applied in a handhold case to specifically deny recovery by a switchman by the Seventh Circuit in *New York, C. & St. L.R.R. v. Kelly*, 70 F.2d 548,

550 (7th Cir.), *cert. denied*, 293 U.S. 595 (1934). Accordingly, the "in use" doctrine has been recognized both in handhold cases and in switchmen[1] cases for at least eight decades. The Texas Court of Appeals decision below is consistent with the *Brady* and *Kelly* decisions.

More recently, the United States Circuit Court of Appeals has clarified the application of the "in use" doctrine to switchmen. Both *Phillips v. CSX Trans., Inc.*, 190 F.3d 285 (4th Cir. 1999), *cert. denied*, 529 U.S. 1004 (2000) and *Deans v. CSX Trans., Inc.*, 152 F.3d 326 (4th Cir. 1998) directly applied the "in use" doctrine to switchmen. No case has held that switchmen are exempt from the Safety Appliance Act's "in use" doctrine or are somehow entitled to preferential treatment under the doctrine. The Texas Court of Appeals, in applying the doctrine to Petitioner, a switchman, created no conflict with those applicable United States Court of Appeals decisions.

Even earlier, in *Trinidad v. Southern Pac. Trans. Co.*, 949 F. 2d 187 (5th Cir. 1991), the Fifth Circuit addressed the "in use" doctrine. Both *Deans* and *Phillips* cited *Trinidad* favorably in their opinions, although they declined to accept the bright line test announced in *Trinidad*. Significantly, the Texas Court of Appeals opinion below does not conflict with *Trinidad*, a point seemingly conceded by Petitioner. In short, no conflict exists between the Texas Court of Appeals decision below and any decision of the United States Supreme Court or of any United States Court of Appeals, particularly on the Questions Presented as identified by Petitioner.

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1. Within the context of this appeal, "switchmen," "brakemen" and "conductors" are interchangeable since the term describes workers of the same craft performing substantially the same duties.

To the extent Petitioner attempts to manufacture a conflict justifying review by certiorari of this case from a purported conflict between *Deans* and *Phillips* contrasted to *Trinidad*, this Court has already denied a Petition for Writ of Certiorari in *Phillips* but three years ago. *Phillips* is the most recent pronouncement of the "in use" doctrine by a United States Court of Appeals. Moreover, even assuming a conflict exists between the holdings of those three cases, review of this case involving an intermediate state Court of Appeals is not the vehicle to resolve any such conflict.

Indeed, the only conflict that Petitioner identifies is between the Texas Court of Appeals opinion and an unpublished opinion by the Texas Court of Appeals in *Synar v. Union Pacific R.R. Co.*, Court of Appeals No. 12-99-00-428-CV, *pet. denied*, Tex. Sup. Ct. Docket No. 01-1252, April 11, 2002. Even assuming one exists, a conflict between the decisions of two state intermediate courts of appeals does not create a conflict or question of law justifying review by this Court. Presumably, the Texas Supreme Court by denying review of both cases saw no conflict or issue worthy of review present in the two state court decisions; no reason is given by Petitioner why the United States Supreme Court should have a greater interest than the Texas Supreme Court in the decisions of lower Texas Courts. Moreover, the conflict, to the extent it exists, involves an unpublished opinion. At the time the *Synar* case was decided, Rule 47.7 of the Texas Rules of Appellate Procedure prohibited the citation as authority of an unpublished opinion and provided that such opinions have no precedential value. Tex. R. App. P. 47.7 (2002). The rule was amended effective January 1, 2003 to allow citation of unpublished opinions with the notation "(not designated for publication)," but any unpublished decision remains without precedential value. Tex. R. App. 47.7 (2003).

Petitioner in essence attempts to use a case that has no precedential value to create a conflict worthy of review by the United State Supreme Court.

The Writ Should Be Denied because the Questions Presented Involve at Best Either a Factual Finding or a Misapplication of a Properly Stated Rule of Law.

Petitioner's second "Question Presented" asks this Court to review whether the railroad car in question was "in use" at the time of Petitioner's injury. As this Court has long held, it does not grant certiorari to review evidence and discuss particular facts, because its certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases. *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J. concurring); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Rule 10 of the Rules of the Supreme Court of the United States, May 1, 2003.* The Texas Court of Appeals did determine that the car was not "in use" at the time of Petitioner's injury, a straightforward application of law to facts. In the best light, Petitioner is either arguing that the Court of Appeals was wrong in its factual determination, applying evidence to the law, that the car was "in use," or that the Texas Court of Appeals misapplied the "in use" doctrine. Petitioner does not claim, nor can he, that the Texas Court of Appeals opinions did not properly state the "in use" doctrine, or that the "in use" doctrine does not exist. Indeed, contrary to the implication in the Petition for Writ of Certiorari, the dissenting opinion in the Texas Court of Appeals decision agreed that "in use" doctrine was applicable to Jones' cause of action; the dissenting Justice disagreed with the majority's factual determination that the car was not "in use" and would have reached the opposite conclusion.

The Decision Below Is Correct.

The decision of the Texas Court of Appeals below is correct. That court made a simple, straight-forward application of a well entrenched doctrine of law first recognized by this Court in 1920, when it decided *United States v. Northern Pac Ry.*, 254 U.S. 251 (1920), recognizing the "in use" doctrine under the train brakes provision of the Safety Appliance Act, then 45 U.S.C. § 9, re-codified as 49 U.S.C. § 20302(a)(5) (1997). Accordingly, the doctrine is one of longevity, even within the world of railroad case law. This application of the doctrine to the craft of switchman is not only one of longevity (*Brady*) but also of recent clarification by *Phillips* and *Deans*. These cases directly apply the doctrine to switchmen. As noted, no case has ever held that switchmen are not covered by the "in use" doctrine.

It is difficult to determine from the Petition for Writ of Certiorari precisely what Jones is claiming as an erroneous decision below. He offers an almost two-page string cite of cases not on point and attacks the Texas Rule of Appellate Procedure addressing unpublished opinions. To the extent the Petition seeks a ruling that switchmen are exempt from the "in use" doctrine, then Petitioner offers no justification for creating a special protected class of railroad employees. Indeed, there is no rational reason why other railroad crafts are subject to the doctrine whereas a switchman is not.

Petitioner's complaint that *Deans* and *Phillips* will lead to "more bad law" unless a writ is granted in this case and his subsequent claim that the application of *Deans*, *Phillips* and the decision below "is to eliminate the [Safety Appliance Act] on switching railroads all over America" is itself specious, as a simple comparison of the holdings in *Deans*

and *Phillips* illustrates. Both cases involve switchmen, but in one case (*Deans)* recovery was allowed under the Safety Appliance Act whereas in the other (*Phillips)* it was not. *Deans*, in outlining the test to be applied in the Fourth Circuit to determine whether a car was "in use," found the car to be "in use"; *Phillips* subsequently applied the same test but with the factual determination that the car there was not "in use." Jones cannot claim that *Deans*, *Phillips* and the Texas Court of Appeals' decision below eliminate recovery by switchmen when just such a recovery was upheld.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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